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# The Hidden Tool in a Foreign Investor's Toolbox: The Trade Preference Program as a "Carrot and Stick" to Secure Compliance with International Law Obligations

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# **The Hidden Tool in a Foreign Investor's Toolbox: The Trade Preference Program as a “Carrot and Stick” to Secure Compliance with International Law Obligations**

***By Peter D. Fox & Charles B. Rosenberg\****

*Abstract: This Article considers the use of the trade preference program as a tool to pressure a State to comply with its international law obligations. Recent international investment disputes involving Argentina, Ecuador, and the Russian Federation bring to light the increasing utility of U.S. and EU trade preference programs as retaliatory mechanisms for such noncompliance. Particularly where a host State either has not consented to arbitration or has allegedly failed to comply with an adverse award, this Article affirms that the trade preference program can have a meaningful impact on a host State and be a valuable tool for a foreign investor.*

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TABLE OF CONTENTS

I. Introduction .....	54
II. Trade Preference Programs .....	57
III. Failure to Enforce Arbitral Awards.....	59
A. Azurix/CMS Gas and Argentina.....	60
1. The Azurix and CMS Gas Disputes .....	60
a. Azurix .....	61
b. CMS Gas.....	62
2. Suspension of Argentina's U.S. GSP Benefits .....	64
B. Chevron and Ecuador .....	65
1. The Lago Agrio Dispute .....	65
2. Ecuador and the U.S. ATPA/ATPDEA .....	67
3. Chevron's Petition.....	68
IV. Expropriation.....	71
A. Yukos and Russia .....	71
1. The Yukos Saga .....	71
2. U.S. Shareholders of Yukos.....	73
3. Russia and the U.S. GSP .....	74
B. Repsol and Argentina .....	76
1. The Repsol Dispute .....	76
2. The EU GSP and Suspension of Argentina's Benefits .....	77
V. Conclusion.....	79

I. INTRODUCTION

International investment, while providing access to new markets, resources, and labor, entails unique considerations from investing locally. One such consideration might arise if a dispute occurs between a foreign investor and a host State. Historically, a foreign investor was limited to seeking redress in the domestic courts of the host State.<sup>1</sup> Of late, however, perceived biases of local courts,<sup>2</sup> together with the proliferation of international investment treaties containing investor-State arbitration provisions,<sup>3</sup> have led foreign investors to turn to international arbitration to

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<sup>1</sup> See Christoph Schreuer, United Nations Conference on Trade and Development, *Course on Dispute Settlement*, Module 2.1, at 7, U.N. Doc. UNCTAD/EDM/Misc.232 (2003), [http://unctad.org/en/docs/edmmisc232overview\\_en.pdf](http://unctad.org/en/docs/edmmisc232overview_en.pdf) ("In the absence of other arrangements, a dispute between a host State and a foreign investor will normally be settled by the domestic courts of the host State.").

<sup>2</sup> See RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 214 (2008) ("Rightly or wrongly, the investor will fear a lack of impartiality from the courts of the state against whom it wishes it pursue its claim. In many countries an independent judiciary cannot be taken for granted and executive interventions in court proceedings or a sense of judicial loyalty to the forum state are likely to influence the outcome of proceedings. This is particularly so where large amounts of money are involved.").

<sup>3</sup> See MCLACHLAN, SHORE & WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE*

resolve their investment disputes.<sup>4</sup> As evidenced by a comprehensive and growing body of case law,<sup>5</sup> international arbitration has become a conventional method of investor-State dispute resolution.

International arbitration, however, is not always an adequate answer. In some cases, the host State has not consented to arbitrate the dispute with the foreign investor; there is no *compromis*, no compromissory clause in an investment agreement or investment law, and no investment treaty to consult.<sup>6</sup> In other cases, the host State has consented to arbitrate but then allegedly fails to comply with an adverse award.<sup>7</sup> In these situations, the foreign investor needs an additional enforcement tool.

This article examines one such tool: the “stick” of the trade preference program, which has been characterized in the literature as a “carrot and stick.”<sup>8</sup> Specifically, this Article discusses the suspension of international

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PRINCIPLES 26 (2010) (“The first BIT was signed in 1959 between Germany and Pakistan. By 1970 there were 72 BITs, by 1980 165, and by 1990 385. The numbers have grown even faster since 1990 and the global total at the end of 2005 was put at 2,495.”). In addition, multilateral investment treaties, such as the Energy Charter Treaty, and free trade agreements that contain investment chapters, such as the North American Free Trade Agreement and the Central America-United States-Dominican Republic Free Trade Agreement, have entered into force in recent years. *See generally* Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95; North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, Dec. 17, 1992; Free Trade Agreement, U.S.-Cent. Am.-Dom. Rep., ch. 10, Aug. 5, 2004.

<sup>4</sup> *See* MCLACHLAN, SHORE & WEINIGER, *supra* note 3, at 26 (“The large number of treaty arbitrations in recent years has been a product of an exponential growth in the number of BITs.”); DOLZER & SCHREUER, *supra* note 2, at 214–15 (noting that a fear of lack of impartiality of the courts of the host State is one of the reasons for granting the foreign investor direct access to arbitration with the host State).

<sup>5</sup> For example, as of June 30, 2013, nearly 270 investor-State arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID) had been concluded. *See List of Concluded Cases*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES (Jun. 30, 2013), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>. Investment treaty arbitration awards, unlike international commercial arbitration awards, are routinely published in full or in redacted form. *See, e.g., ICSID Arbitration Rules*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, art. 48(4) (2007), <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partF-chap06.htm#r48>; NAFTA, Annex 1137.4; *Newly Posted Awards, Decisions and Materials*, INV. TREATY ARBITRATION, <http://italaw.com/about.htm> (last visited Nov. 26, 2013) (providing “access to all publicly available investment treaty awards”); INTERNATIONAL ARBITRATION CASE LAW, <http://www.internationalarbitrationcaselaw.com/> (last visited Nov. 26, 2013) (summarizing investment treaty arbitration decisions).

<sup>6</sup> A *compromis* is an agreement to submit existing disputes to arbitration, while a compromissory clause is an agreement to submit future disputes to arbitration. *See generally* Christoph Schreuer, United Nations Conference on Trade and Development, Course on Dispute Settlement, Module 2.3, at 7–24, UNCTAD/EDM/Misc.232/Add.2 (2003), [http://unctad.org/en/docs/edmmisc232add2\\_en.pdf](http://unctad.org/en/docs/edmmisc232add2_en.pdf) (describing the principal ways in which States consent to arbitrate investment disputes with foreign investors). *See also infra* Section IV(A) (noting that the U.S. shareholders of Yukos have been unable to commence international arbitration against the Russian Federation because there is no investment treaty providing for investor-State arbitration between the United States and the Russian Federation).

<sup>7</sup> *See infra* Section III(A) (examining Argentina’s alleged failure to comply with the *Azurix* and *CMS Gas* ICSID awards).

<sup>8</sup> *See, e.g.,* Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights*

trade benefits to secure a State's compliance with its international law obligations. Some might question the utility of this "stick" approach since, as opposed to international arbitration, it depends, at least in part, on the political discretion of the investor's home State. However, investors and host States (particularly developing States that are the beneficiaries of trade preference programs) should be aware that this "stick" strategy is more than an untested theory. In 2012, the United States suspended Argentina's preferential trade status under its Generalized System of Preferences (GSP) as a result of Argentina's alleged failure to enforce arbitral awards in favor of U.S. investors.<sup>9</sup>

This Article reviews recent investment disputes involving Argentina, Ecuador, and the Russian Federation, and explores rationales for the suspension of a State's preferential trade status based on its failure to fulfill international law obligations. Section II presents the underlying principles behind trade preference programs and introduces the U.S. GSP scheme. Section III examines grounds for suspension of international trade benefits due to a host State's failure to comply with arbitral awards. This section focuses on recent developments involving Argentina and Ecuador under U.S. law, including the recent suspension of Argentina's preferential trade status under the U.S. GSP. Section IV discusses a separate basis for the suspension of international trade benefits: a host State's expropriation of a foreign investor's investment without prompt, adequate, and effective compensation. This section focuses on recent developments involving the Russian Federation and Argentina under U.S. and EU law. Section V concludes by noting the increasing frequency of international investment disputes between foreign investors and host States. Where international arbitration or traditional litigation do not offer viable methods of dispute resolution, all parties should be mindful of the trade preference program as an additional leveraging tool.

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*Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 694 (2003) ("Unilateral American measures offer the 'carrot' of trade benefits to induce countries to improve their labor policies as a condition of being designated a beneficiary country. These laws then provide the 'stick' of the threat of withdrawal of trade preferences if the country's labor rights and other conditions fail to maintain the statutorily set standards, or fail to improve any further."); Kristi Schaeffer, Note, *Mercosur and Labor Rights: The Comparative Strengths of Sub-Regional Trade Agreements in Developing and Enforcing Labor Standards in Latin American States*, 45 COLUM. J. TRANSNAT'L L. 829, 853–54 (2007) ("United States is able to employ a 'carrot and stick' approach in influencing the outcome of negotiations, in which the carrot is trade benefits and the stick is the threat of denial or withdrawal of those benefits.").

<sup>9</sup> See *infra* Section III(A).

## II. TRADE PREFERENCE PROGRAMS

For more than three decades, the United States, the European Union, and several other developed States have maintained trade programs to promote export-driven economic growth in developing States through preferential tariff rates.<sup>10</sup> In theory, this strategy frees “beneficiary” developing States from overdependence on trade in cultivated raw materials, whose price unpredictability and sluggish growth contribute to trade deficits.<sup>11</sup> A distinguishing characteristic of trade preference programs is their unilateral, non-reciprocal nature. Beneficiary States must continue to meet certain statutory standards to maintain their eligibility, which demonstrates the potential for a trade preference program to be utilized both as an economic assistance tool (carrot) and as a foreign policy tool (stick).

The GSP is a trade preference program that was established, in part, to reconcile two competing economic approaches to trade equity. Article I of the General Agreement on Tariffs and Trade 1947 (GATT) requires GATT Contracting Parties to extend most-favored nation (MFN) treatment to imports from other Contracting Parties.<sup>12</sup> This means that a State cannot tax imports of the same item from different States at different rates. Yet developing States opposed this principle of categorical tax treatment equality among trading partners, arguing that the equal treatment of unequal partners was discriminatory.<sup>13</sup> Developing States instead pushed for special treatment in their favor, and without reciprocity. GSP schemes thus provided a vehicle for unilateral special treatment for developing States while assuaging fears in developed States of domestic market disruptions stemming from tariff disarmament.<sup>14</sup>

In 1971, the GATT Contracting Parties temporarily waived the MFN

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<sup>10</sup> See *About GSP*, UNITED NATIONS CONFERENCE ON TRADE & DEV. (2012), <http://www.unctad.org/en/Pages/DITC/GSP/About-GSP.aspx>.

<sup>11</sup> See VIVIAN C. JONES, CONG. RESEARCH SERV., RL33663, GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE 2 (2012) (citing REPORT OF THE SECRETARY-GENERAL OF THE OECD, THE GENERALIZED SYSTEM OF PREFERENCES: REVIEW OF THE FIRST DECADE 9 (1983)).

<sup>12</sup> General Agreement on Tariffs and Trade art. I, ¶ 1, Jan. 1, 1948, 55 U.N.T.S. 196 (“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”).

<sup>13</sup> See André Sapir & Lars Lundberg, *The U.S. Generalized System of Preferences and Its Impacts*, in THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY 195 (Robert E. Baldwin & Anne O. Krueger eds., University of Chicago Press 1984).

<sup>14</sup> See JONES, *supra* note 11, at 2.

provisions for a period of ten years.<sup>15</sup> In 1979, the Parties adopted the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (referred to as the Enabling Clause), which enshrined a permanent waiver to the MFN clause and authorized States to grant preferential tariff treatment under their respective GSP schemes.<sup>16</sup> The Enabling Clause thus forms the legal basis for preferential trade programs, including the GSP.

In the United States, the Office of the United States Trade Representative (USTR) administers the GSP, which was first authorized by Title V of the Trade Act of 1974.<sup>17</sup> The U.S. GSP, according to the USTR, is “designed to promote economic growth in the developing world” by extending duty-free treatment to thousands of products imported from developing States.<sup>18</sup>

The U.S. GSP statute provides that the U.S. President may assign beneficiary developing country (BDC) status to a State in accordance with specific discretionary criteria. The President also must act with “due regard” for the effect of export expansion on the beneficiary’s economic development as well as the anticipated economic impact of the designation on U.S. producers of competing products.<sup>19</sup> The President must consider such factors as the level of economic development of the State,<sup>20</sup> the extent to which the State has assured the United States that it will provide access to its market,<sup>21</sup> and the extent to which the State is protecting intellectual

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<sup>15</sup> See Generalized System of Preferences Waiver art. (a), Jun. 25, 1971, GATT B.I.S.D. 18S/24 (“[T]he provisions of Article I [of the GATT 1947] shall be waived for a period of ten years to the extent necessary to permit developed contracting parties . . . to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties . . .”).

<sup>16</sup> See Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, arts. 1, 2(a), L/4903, Nov. 28, 1979, GATT B.I.S.D. L/4903 (“1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. 2. The provisions of paragraph 1 apply to the following: a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences”).

<sup>17</sup> See 19 U.S.C. § 2101 *et seq.*

<sup>18</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) GUIDEBOOK 3 (Dec. 2012) [hereinafter GSP GUIDEBOOK], <http://www.ustr.gov/sites/default/files/GSP%20Guidebook.pdf>.

<sup>19</sup> See Trade Act of 1974, P.L. 93-618, Title V, as amended, 19 U.S.C. § 2461.

<sup>20</sup> See 19 U.S.C. § 2462(c)(2) (2002) (“In determining whether to designate any country as a beneficiary developing country under this subchapter, the President shall take into account . . . the level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors which the President deems appropriate.”).

<sup>21</sup> See 19 U.S.C. § 2462(c)(4) (“In determining whether to designate any country as a beneficiary developing country under this subchapter, the President shall take into account . . . the extent to which such country has assured the United States that it will provide equitable and reasonable access to the

property rights.<sup>22</sup> The statute also mandates bases of explicit ineligibility for BDC status, including, for example, if a State is Communist<sup>23</sup> or if a State aids or abets any individual or group that has committed an act of international terrorism.<sup>24</sup>

The list of GSP-eligible articles and States can be modified during an annual review by the Trade Policy Staff Committee (TPSC), a body chaired by the USTR and made up of representatives from the U.S. Departments of Treasury, Commerce, Labor, State, Agriculture, and the Interior.<sup>25</sup> The annual review determines whether there is a positive or negative impact on the economies of the United States and recipient States. The TPSC's GSP Subcommittee considers comments from interested persons—including private corporations—when it makes recommendations to the President regarding the continuing eligibility of beneficiary States.<sup>26</sup>

### III. FAILURE TO ENFORCE ARBITRAL AWARDS

One mandatory factor affecting BDC eligibility under the U.S. GSP statute is a State's failure to comply with international arbitral awards in favor of U.S. persons:

The President shall not designate any country a beneficiary developing country . . . if . . . [s]uch country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute.<sup>27</sup>

This factor stems from an amendment to the Trade Act of 1974 offered by Senator Robert Taft, Jr.,<sup>28</sup> who was “extremely concerned” about the government of India’s “apparent refusal” to honor arbitral awards in favor of U.S. persons.<sup>29</sup> Senator Taft lamented that the government of India effectively refused to honor adverse arbitral awards by routinely

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markets and basic commodity resources of such country and the extent to which such country has assured the United States that it will refrain from engaging in unreasonable export practices.”).

<sup>22</sup> See 19 U.S.C. § 2462(c)(5).

<sup>23</sup> See 19 U.S.C. § 2462(b)(2)(A).

<sup>24</sup> See 19 U.S.C. § 2462(b)(2)(F).

<sup>25</sup> See generally 15 C.F.R. § 2007 (implementing regulations for the U.S. GSP); see also GSP GUIDEBOOK, *supra* note 18, at 10.

<sup>26</sup> See GSP GUIDEBOOK, *supra* note 18, at 10–11.

<sup>27</sup> See 19 U.S.C. § 2462(b)(2)(E).

<sup>28</sup> See TRADE ACT OF 1974, H.R. REP. NO. 93-1644, at 52–53 (1974) (Conf. Rep.).

<sup>29</sup> See 120 CONG. REC. 39,831 (1974).



directing them to its national courts, which rebuffed their enforcement.<sup>30</sup>

Two contemporary international investment disputes are instructive on this issue. The first is a 2012 decision by the United States to suspend Argentina's preferential trade status under its GSP due to Argentina's alleged failure to comply with the *Azurix* and *CMS Gas* International Centre for Settlement of Investment Disputes (ICSID) awards. The second is the recent petition by Chevron Corporation (Chevron) to suspend Ecuador's trade benefits following Ecuador's alleged failure to comply with international arbitral awards. The controversy arises out of the *Lago Agrio* dispute under the Andean Trade Promotion and Drug Eradication Act (ATPA/ATPDEA), a U.S. trade preference program that similarly conditions benefits on compliance with arbitral awards.

#### A. Azurix/CMS Gas and Argentina

In May 2012, the United States suspended Argentina's preferential trade status under its GSP program, in response to Argentina's alleged failure to comply with the ICSID awards in *Azurix* and *CMS Gas*.<sup>31</sup> This marked the first suspension in the history of the U.S. GSP for failure to pay an arbitral award.<sup>32</sup>

##### 1. *The Azurix and CMS Gas Disputes*

Argentina suffered a spectacular economic crisis in late 2001 and early 2002 that led to a spate of international arbitration claims by foreign investors.<sup>33</sup> During the late 1980s, facing crippling hyper-inflation and a serious currency exchange crisis, the fledgling democratic government of President Carlos Menem instituted an expansive State reform program that included two key measures: (1) a restructuring of the public sector that included the privatization of State-owned public utilities through long-term concessions and licenses; and (2) a law that pegged the Argentine peso to the U.S. dollar on a one-to-one basis.<sup>34</sup> The ensuing flood of foreign

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<sup>30</sup> See *id.*

<sup>31</sup> See Proclamation No. 8788, 77 Fed. Reg. 18,899, 18,899 (Mar. 29, 2012). The suspension was made pursuant to 19 U.S.C. §§ 2462(b)(2)(E) and (d)(2), and took effect 60 days after the presidential proclamation was published in the Federal Register on March 29, 2012, i.e., on May 28, 2012.

<sup>32</sup> See *US Suspends Special Tariffs for Argentina*, BBC NEWS (Mar. 26, 2012), <http://www.bbc.co.uk/news/business-17517838>.

<sup>33</sup> See Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 41 (2004); see also Harout Samra, *Five Years Later: The CMS Award Placed in the Context of the Argentine Financial Crisis and the ICSID Arbitration Boom*, 38 U. MIAMI INTER-AM. L. REV. 667, 667-68 (2007).

<sup>34</sup> See Di Rosa, *supra* note 33, at 44; see also *infra* note 50. President Menem's audacious reforms were initially credited with bringing about an economic renaissance in Argentina following years of

investors that entered Argentina's public utilities sector were attracted by the newly secure and stable investment environment touted by Argentine officials and U.S. investment banks alike.<sup>35</sup> But in the wake of economic collapse, the Argentine government abandoned these reform policies. Argentina's retreat unilaterally altered existing contracts with foreign investors and led multinationals to seek out international arbitration mechanisms for relief, contained in the bilateral investment treaties (BITs) signed by Argentina.

a. Azurix

In 1996, the province of Buenos Aires in Argentina (Province) began privatizing its potable water and sewage services, which at the time were controlled by the Administración General de Obras Sanitarias de la Provincia de Buenos Aires (AGOSBA).<sup>36</sup> The privatization process granted the future operator a concession under a newly legislated regulatory framework,<sup>37</sup> and the concessionaire was required to be a company incorporated in Argentina.<sup>38</sup>

Following a successful bid by the Azurix group of companies, Azurix Buenos Aires SA (ABA) was duly incorporated in Argentina to act as concessionaire. ABA was a subsidiary of Azurix Corp. (Azurix), a U.S.-based water services firm incorporated in Delaware. In June 1999, ABA, AGOSBA, and the Province executed an agreement that granted a 30-year concession for "the distribution of potable water, and the treatment and disposal of sewerage in the Province."<sup>39</sup>

In late 2001, after Argentina passed emergency measures to address its developing economic crisis, Azurix gave notice of termination of the concession and filed for bankruptcy. Azurix maintained that Argentina's emergency measures amounted to expropriation because they resulted in the non-application of the tariff regime agreed upon in the concession contract, which prevented Azurix from securing adequate financing.<sup>40</sup>

In September 2001, Azurix requested ICSID arbitration against Argentina pursuant to the United States-Argentina BIT, alleging that Argentina expropriated its investment through measures tantamount to

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economic mismanagement by an entrenched military junta, but irresponsible tax and spending initiatives created mounting pressure that rendered the new environment unsustainable. See Samra, *supra* note 33, at 673–76.

<sup>35</sup> See Di Rosa, *supra* note 33, at 44–45.

<sup>36</sup> See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 38 (July 14, 2006).

<sup>37</sup> See Law No. 11,820, Provincia de Buenos Aires, Aug. 28, 1996, B.O. (Arg.).

<sup>38</sup> See *Azurix*, *supra* note 36, ¶ 38.

<sup>39</sup> See *id.* ¶ 41.

<sup>40</sup> See *id.* ¶ 43.

cancelling the concession.<sup>41</sup> Azurix further alleged that Argentina failed to provide fair and equitable treatment to Azurix's investment, and that it had taken arbitrary measures that impaired Azurix's use and enjoyment of its investment.<sup>42</sup> Argentina defended on the basis that this was a contractual dispute, the problems encountered by Azurix as operator were of its own making, the price paid for the concession was excessive, and Azurix did not comply with the terms of the agreement—in particular, its investment obligations.<sup>43</sup>

The ICSID tribunal rendered an award in 2006, which, *inter alia*, rejected Azurix's claim of expropriation but held that Argentina had breached the fair and equitable treatment, full protection and security, and arbitrary measures provisions of the BIT.<sup>44</sup> The tribunal awarded Azurix \$165 million in compensation, representing the "fair market value of the concession" plus compound interest.<sup>45</sup> In 2009, an ICSID ad hoc committee dismissed in its entirety Argentina's application for annulment of the award.<sup>46</sup>

b. CMS Gas

Argentina's economic reform efforts also included the denationalization of its gas sector. Law No. 24.076 of 1992 (Gas Law) established a legal framework for the privatization of the gas industry and the regulation of natural gas transportation and distribution.<sup>47</sup> The Gas Law divided Gas del Estado, the State-owned monopoly, into several business entities including Transportadora de Gas Norte (TGN), which was granted a license to transport gas in Argentina.<sup>48</sup> Investors accessed TGN through a public tender offer,<sup>49</sup> and by 1999, TGN was thirty percent owned by CMS Gas Argentina, a subsidiary of the U.S.-corporation CMS Gas Transmission Company (CMS Gas). Under the new licensure and legal framework, tariffs were calculated in dollars, converted to pesos at the time of billing, and "adjusted every six months in accordance with the United

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<sup>41</sup> See *id.* The United States-Argentina Bilateral Investment Treaty (BIT) provides that investor-State disputes under the BIT may be submitted to, *inter alia*, ICSID arbitration. United States-Argentina BIT, art. VII(3)(a)(i).

<sup>42</sup> See *Azurix*, *supra* note 36, ¶ 43.

<sup>43</sup> See *id.* ¶ 44.

<sup>44</sup> See *id.* ¶ 442.

<sup>45</sup> See *id.*

<sup>46</sup> See *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Annulment Proceeding, ¶ 179 (Sept. 1, 2009).

<sup>47</sup> See NATHALIE BERNASCONI-OSTERWALDER & LISE JOHNSON, INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM 2000–2010 43 (2011), [http://www.iisd.org/pdf/2011/int\\_investment\\_law\\_and\\_sd\\_key\\_cases\\_2010.pdf](http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf).

<sup>48</sup> See *id.*

<sup>49</sup> See *Samra*, *supra* note 33, at 681.

States Producer Price Index [U.S. PPI].”<sup>50</sup>

In July 2000, CMS Gas agreed to a temporary suspension of the U.S. PPI adjustment arrangement due to the severity of the Argentine economic crisis.<sup>51</sup> The industry’s public regulatory authority subsequently announced that it would extend the duration of the adjustments freeze, and by August 2000, an Argentine court issued an injunction formally suspending the July 2000 agreement.<sup>52</sup> As the economic crisis deepened in early 2002, the right of public utility licensees to adjust tariffs according to the U.S. PPI, as well as the calculation of tariffs in dollars, was terminated through a public emergency law.<sup>53</sup>

In July 2001, CMS Gas requested ICSID arbitration against Argentina, alleging that Argentina violated its obligations under the United States–Argentina BIT when it suspended the tariff adjustment formula for gas transportation applicable to its investment.<sup>54</sup> In 2005, the tribunal rendered an award that held that Argentina breached its obligations under the BIT by failing to accord fair and equitable treatment and failing to uphold its investment obligation.<sup>55</sup> The tribunal awarded \$133.2 million in compensation, plus interest.<sup>56</sup> An ad hoc committee in 2007 upheld Argentina’s application for annulment of the award in part,<sup>57</sup> but nonetheless sustained the overall holding in favor of CMS Gas.<sup>58</sup>

Notwithstanding their ICSID awards, *Azurix* and *CMS Gas* remain in dispute with Argentina. To date, these awards have not been paid. Both Azurix and CMS Gas argue that Argentina’s failure to “abide by and comply with the terms of the award” violates Article 53 of the ICSID Convention.<sup>59</sup>

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<sup>50</sup> Law No. 23.928 of 1991 on Convertibility and Decree No. 2128/91 fixed the Argentine peso at par with the U.S. dollar. See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 53 (May 12, 2005).

<sup>51</sup> See *CMS Gas*, *supra* note 50, ¶ 60; BERNASCONI-OSTERWALDER & JOHNSON, *supra* note 47, at 43.

<sup>52</sup> See *CMS Gas*, *supra* note 50, ¶¶ 62–65.

<sup>53</sup> See *id.* ¶¶ 64–65; see also BERNASCONI-OSTERWALDER & JOHNSON, *supra* note 47, at 43–44. The tariffs were re-denominated in pesos at a rate of one peso to the dollar. See *CMS Gas*, *supra* note 50, ¶ 65.

<sup>54</sup> See *CMS Gas*, *supra* note 50, ¶ 4.

<sup>55</sup> See *id.* at 139.

<sup>56</sup> See *id.*

<sup>57</sup> See *CMS Gas Transmission Co. v. Argentine Republic*, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8 (Annulment), Sept. 25, 2007, ¶ 159 [hereinafter *CMS Gas Annulment*] (annulling the tribunal’s ruling on the umbrella clause for failure to state reasons); see also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52(1)(e), Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter *ICSID Convention*] (“Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (e) that the award has failed to state the reasons on which it is based.”).

<sup>58</sup> See *CMS Gas Annulment*, *supra* note 57, ¶ 159.

<sup>59</sup> See *ICSID Convention*, *supra* note 57, art. 53(1) (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.

Argentina disagrees with Azurix's and CMS Gas's interpretation of the ICSID Convention. It maintains that Article 53 of the ICSID Convention cannot be read in isolation.<sup>60</sup> Instead, Argentina argues that Article 53 must be read in context with Article 54<sup>61</sup> because these provisions are both included in Section 6 of Chapter IV of the ICSID Convention and "complement each other."<sup>62</sup> According to Argentina, Article 54 does not require it to pay ICSID awards until the award holders bring formal proceedings in the Argentine courts to collect payment, which Azurix and CMS Gas have not pursued.<sup>63</sup>

## 2. *Suspension of Argentina's U.S. GSP Benefits*

In May 2009, the GSP Subcommittee initiated the 2009 GSP Annual Review to review the status of certain BDCs.<sup>64</sup> Azurix and Blue Ridge Investments, L.L.C. submitted petitions requesting that the United States withdraw Argentina's designation as a BDC due to its purported failure to enforce the *Azurix* and *CMS Gas* awards (Blue Ridge, a Bank of America subsidiary, previously had purchased the *CMS Gas* award).<sup>65</sup> Both petitions requested suspension of Argentina's BDC status on the basis that Argentina had failed to "act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association."<sup>66</sup>

The GSP Subcommittee accepted the petitions for review in August 2010,<sup>67</sup> but continued them into the 2010 and 2011 GSP Reviews.<sup>68</sup> In

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Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.").

<sup>60</sup> See *Siemens AG v. Argentine Republic*, Argentina's Response to the United States Department of State's Letter, ICSID Case No. ARB/02/8, June 2, 2008, at 2.

<sup>61</sup> See ICSID Convention, *supra* note 57, art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.").

<sup>62</sup> See *Siemens AG*, *supra* note 60, at 2.

<sup>63</sup> For a further discussion of Argentina's interpretation of the obligation to "abide by and comply with" ICSID awards in Article 53 of the ICSID Convention, see generally Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT'L L. 503 (2013).

<sup>64</sup> See 2009 Annual GSP Review, 74 Fed. Reg. 25,605, 25,605 (May 28, 2009) (initiation).

<sup>65</sup> See Petition for Review of the Republic of Argentina's Eligibility Under GSP by Azurix Corp., 2009 GSP Annual Review, 4 Dec. 2009; Petition for the Withdrawal of the Application of Duty-Free Treatment to Articles of Argentina by Blue Ridge Investments, L.L.C., 2009 GSP Annual Review, June 23, 2010.

<sup>66</sup> See 19 U.S.C. § 2462(b)(2)(E).

<sup>67</sup> See 2009 Annual GSP Review, 75 Fed. Reg. 48,737 (Aug. 11, 2010) (notice regarding the announcement of petitions accepted).

<sup>68</sup> See *GSP 2011 Annual Review Country Practice Petitions under Review*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, [http://www.ustr.gov/sites/default/files/GSP%202011%20Annual%20Review\\_0.pdf](http://www.ustr.gov/sites/default/files/GSP%202011%20Annual%20Review_0.pdf) (last visited Nov. 17, 2013).

March 2012, however, U.S. President Barack Obama issued a proclamation declaring that “it is appropriate to suspend Argentina’s designation as a GSP beneficiary developing country because it has not acted in good faith in enforcing arbitral awards in favor of United States” persons.<sup>69</sup> The suspension took effect in May 2012, sixty days after the presidential proclamation was published in the Federal Register.<sup>70</sup> Notably, this is the first time in the history of the U.S. GSP that the United States has suspended a State’s preferential trade status for failing to pay an arbitral award.<sup>71</sup>

Argentinean imports will now be subject to the higher U.S. MFN import tariff rate, making exporting Argentinean goods to the United States more expensive.<sup>72</sup> This will make it more difficult for Argentinean goods to compete in the U.S. market and might lead U.S. suppliers and consumers to substitute comparable products for Argentinean goods (e.g., Chilean wine instead of Argentinean wine).

#### B. Chevron and Ecuador

In the footsteps of Argentina’s suspension from the U.S. GSP, Chevron petitioned the USTR to suspend Ecuador’s trade benefits under the ATPA/ATPDEA, a U.S. preferential trade program that provides reduced-duty or duty-free treatment for goods imported from Ecuador, as a result of Ecuador’s alleged failure to comply with international arbitral awards arising out of the *Lago Agrio* dispute.

##### 1. *The Lago Agrio Dispute*

In 2003, in a “makeshift courtroom” in an “overgrown oil camp” in northeastern Ecuador called Lago Agrio, 30,000 Amazonian settlers and indigenous people brought Chevron to trial for the contamination of 1,700 square miles of Ecuadorian rainforest with crude oil, associated wastes, and the toxic compounds used for drilling that leaked into the Amazonian watershed.<sup>73</sup> The legal antecedents of the case now span decades. Texaco, which was acquired by Chevron in 2001, signed a drilling contract with Ecuador in 1964, and began full-scale oil production in 1972 before

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<sup>69</sup> See Press Release, The White House, Presidential Proclamation—To Modify Duty-free Treatment Under the Generalized System of Preferences and for Other Purposes (Mar. 26, 2012), <http://www.whitehouse.gov/the-press-office/2012/03/26/presidential-proclamation-modify-duty-free-treatment-under-generalized-s>.

<sup>70</sup> See *id.*

<sup>71</sup> See *US Suspends Special Tariffs for Argentina*, *supra* note 32.

<sup>72</sup> See *GSP Fact Sheet*, EMBASSY OF THE U.S. IN BUENOS AIRES, ARG., <http://argentina.usembassy.gov/gsp2.html> (last visited Jan. 13, 2014).

<sup>73</sup> William Langewiesche, *Jungle Law*, VANITY FAIR (May 2007), available at <http://www.vanityfair.com/politics/features/2007/05/texaco200705>.

withdrawing from the State in the early 1990s.<sup>74</sup>

In September 2009, concurrent with the underlying litigation of the *Lago Agrio* case, Chevron commenced ad hoc international arbitration proceedings against Ecuador in The Hague pursuant to Article VI of the United States–Ecuador BIT.<sup>75</sup> Chevron maintained that Texaco had settled the *Lago Agrio* dispute with Ecuador in 1998, and that any adverse ruling by the *Lago Agrio* court would violate the United States–Ecuador BIT.<sup>76</sup> It sought to enforce prior settlement and release agreements signed between Texaco and the government of Ecuador in the 1990s that allegedly released Texaco from liability related to environmental damage. In its request for relief, Chevron requested, *inter alia*, declarations releasing Chevron from all liability and proclaiming Ecuador in breach of its obligations under the BIT.<sup>77</sup>

In February 2011, the Ecuadorian court in *Lago Agrio* ruled against Chevron and imposed damages of \$18.2 billion, later increased to \$19 billion.<sup>78</sup> One year later, however, the arbitral tribunal in The Hague issued interim awards restraining enforcement of the Ecuadorian judgment,<sup>79</sup> and ruled that the tribunal had jurisdiction to hear the claims advanced by Chevron.<sup>80</sup> That arbitration has now proceeded to the merits phase.<sup>81</sup>

Chevron's claims are unique in investment treaty arbitration because the company is asking a tribunal to invalidate a judgment awarded to non-parties to the BIT arbitration: the private Ecuadorian plaintiffs in the

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<sup>74</sup> *Id.*

<sup>75</sup> Claimants' Notice of Arbitration, Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador, UNCITRAL Arb., PCA Case No. 2009-23, at 16 (Sept. 23, 2009).

<sup>76</sup> *Id.* at 2. Chevron maintains that the *Lago Agrio* case was "fraught with gross improprieties and denials of basic fairness and due process from beginning to end." See Petition Requesting Withdrawal or Suspension of the Designation of Ecuador as an Andean Trade Preference Act Beneficiary Country, Sept. 17, 2012, at 4.

<sup>77</sup> Chevron Corp. & Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case No. 2009-23, Second Interim Award on Interim Measures, at 4 (Feb. 16, 2012).

<sup>78</sup> Maria Aguinda et al. v. Chevron Texaco Corp., Proceeding No. 002-2003 (Feb. 14, 2011), (Provincial Ct. of Sucumbíos, Sole Div.) (at first instance); Maria Aguinda et al. v. Chevron Texaco Corp., Proceeding No. 2011-0106 (Feb. 7, 2012) (Provincial Ct. of Sucumbíos, Sole Div.) (on appeal).

<sup>79</sup> *Chevron*, *supra* note 77, at 3 (ordering "the Respondent (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments rendered in favour of the Ecuadorian plaintiffs").

<sup>80</sup> Chevron Corp. & Texaco Petroleum Co. v. The Republic of Ecuador, PCA Case 2009-23, Third Interim Award on Jurisdiction and Admissibility, at IV 28 (Feb. 27, 2012).

<sup>81</sup> In October 2012, the United States Supreme Court rejected an appeal by Chevron to block the *Lago Agrio* court judgment. See *Supreme Court Denies Chevron \$19bn Ecuador Appeal*, BBC NEWS (Oct. 9, 2012), <http://www.bbc.co.uk/news/world-us-canada-19892561>. The Ecuadorian plaintiffs seek recognition and enforcement of the judgment in courts outside Ecuador. See, e.g., Petition to Brazilian Courts to Recognize Ecuadorean Judgment, Chevron Corp. & Texaco Petroleum Co. v. The Republic of Ecuador (S.T.J. 2012).

underlying *Lago Agrio* lawsuit.<sup>82</sup> The company, at the same time, has petitioned the USTR to suspend Ecuador's preferential trade benefits under the ATPA/ATPDEA.

## 2. Ecuador and the U.S. ATPA/ATPDEA

The United States' Andean Trade Preference Act (ATPA), enacted in 1991, provided extensive reduced-duty or duty-free treatment for goods imported from four Andean countries: Bolivia, Colombia, Ecuador, and Peru.<sup>83</sup> The program was designed to discourage illicit drug production and trafficking in the region by incentivizing economic alternatives.<sup>84</sup> In August 2002, the Andean Trade Promotion and Drug Eradication Act (ATPDEA) renewed and replaced the ATPA, extending duty-free treatment to any product not specifically excluded.<sup>85</sup>

Until July 31, 2013, Ecuador was the only eligible beneficiary country remaining under the ATPA/ATPDEA.<sup>86</sup> At the time of writing, the United States has not renewed Ecuador's status. Colombia and Peru have negotiated free trade agreements with the United States,<sup>87</sup> and Bolivia was suspended from the ATPA/ATPDEA in 2008 for its failure to cooperate in the U.S. war on drugs.<sup>88</sup> Ecuador has not negotiated a free trade agreement

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<sup>82</sup> United States-Ecuador BIT, U.S.-Ecuador, Aug. 27, 1993, S. Treaty Doc. 103-15, art. VI(6); UNCITRAL ARBITRATION RULES art. 32(2) (1976). Under the United States-Ecuador BIT and UNCITRAL Arbitration Rules, the tribunal's awards are only binding on the parties to the investor-State dispute.

<sup>83</sup> See generally *Andean Trade Preference Act (ATPA)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/andean-trade-preference-act-atpa> (last visited Nov. 17, 2013).

<sup>84</sup> *Id.*

<sup>85</sup> OFFICE OF THE U.S. TRADE REPRESENTATIVE, SIXTH REPORT TO THE CONGRESS ON THE OPERATION OF THE ANDEAN TRADE PREFERENCE ACT AS AMENDED 1 (2012) [hereinafter ATPA REPORT], [http://www.ustr.gov/webfm\\_send/3488](http://www.ustr.gov/webfm_send/3488).

<sup>86</sup> Ecuador's beneficiary status under the ATPA expired on July 31, 2013. *Id.* at 3; Doug Palmer, *Congress to Let U.S. Trade Benefits for Ecuador Expire*, REUTERS (July 25, 2013, 4:10 PM), <http://www.reuters.com/article/2013/07/25/us-usa-ecuador-trade-idUSBRE96O1BL20130725>. The expiration occurred in the context of an unfolding international political drama: Ecuador incensed Washington lawmakers when it offered to consider an asylum application from former National Security Agency contractor Edward Snowden and, after a senior U.S. lawmaker threatened to revoke Ecuador's trade benefits, Ecuador unilaterally renounced Ecuador's ATPA/ATPDEA trade benefits. *Id.* To compensate exporters for the estimated \$23–\$26 million per year of economic losses that will result from the re-imposed tariffs, Ecuador's National Assembly passed a law on July 30, 2013 compensating affected exporters. Mercedes Alvaro, *Ecuador to Compensate Exporters Hurt by End of U.S. Trade Preferences*, WALL ST. J. (July 31, 2013, 3:36 PM), <http://online.wsj.com/article/BT-CO-20130731-715304.html>.

<sup>87</sup> United States-Colombia Trade Promotion Agreement, H.R. 3078, 112th Cong. (2011); United States-Peru Trade Promotion Agreement, H.R. 3688, 110th Cong. (2007).

<sup>88</sup> Proclamation No. 8323, 73 Fed. Reg. 72,677 (Nov. 25, 2008) (determining, after reviewing statutorily required public comments and a public hearing, that Bolivia no longer satisfies the eligibility criteria related to counternarcotics, and suspending Bolivia's status as a beneficiary country for



with the United States, and now must pay the full tariffs on formerly duty-free products.

According to the USTR's report to Congress regarding the program, U.S. imports from the Andean region increased forty-three percent over the past five years, and all twenty leading imports from the region in 2011 were eligible for duty-free treatment when the ATPA/ATPDEA was in effect.<sup>89</sup> Ecuador supplied thirty-nine percent of these U.S. imports in 2011 (\$1.7 billion), and of that amount, ninety-three percent were Ecuadorian petroleum products (\$1.6 billion).<sup>90</sup> Other significant imports from Ecuador included cut flowers (\$60 million) and fruits (\$20 million), which accounted for 3.5 percent and 1.2 percent of ATPA/ATPDEA entries from Ecuador, respectively.<sup>91</sup>

In similar fashion to how GSP-eligible articles and States can be modified during an annual review, Section 3202(f) of the ATPA/ATPDEA requires the USTR to submit to Congress a report on the operation of the trade preference program every two years.<sup>92</sup> Before submitting the report, USTR must solicit comments on whether States are meeting the criteria set forth to maintain their beneficiary status.<sup>93</sup>

Also similar to the GSP program, the ATPA/ATPDEA conditions preferential trade benefits on compliance with international arbitral awards:

The President shall not designate any country a beneficiary country . . . if such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation . . . which is 50 percent or more beneficially owned by United States citizens . . . .<sup>94</sup>

### 3. *Chevron's Petition*

In June 2012, the USTR issued its report to the U.S. Congress on the

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purposes of the ATPA/ATPDEA).

<sup>89</sup> Letter from the Embassy of Ecuador in the United States to the Assistant U.S. Trade Representative for Trade Policy and Economics, Sept. 17, 2012, at 2 (citing ATPA REPORT, *supra* note 85, at 6–7). However, U.S. imports under ATPA/ATPDEA decreased from 2010 to 2011, due in part to a lapse in the ATPA/ATPDEA during 2011. ATPA REPORT, *supra* note 85, at 7. Imports from Ecuador decreased 59 percent to \$1.7 billion in 2011, from \$4.2 billion in 2010. *Id.* at 9.

<sup>90</sup> ATPA REPORT, *supra* note 85, at 9.

<sup>91</sup> *Id.*

<sup>92</sup> 19 U.S.C. § 3202(f)(1) (2006).

<sup>93</sup> 19 U.S.C. § 3202(f)(2).

<sup>94</sup> 19 U.S.C. § 3202(c)(3). A similar provision is contained in the Caribbean Basin Initiative (CBI), which provides duty-free access to the U.S. market for most goods from seventeen States in the Caribbean and Central America. 19 U.S.C. § 2702(b)(3) (2006) (“[T]he President shall not designate any country a beneficiary country . . . if such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation . . . which is 50 percent or more beneficially owned by United States citizens . . . .”).

ATPA/ATPDEA, which noted that certain “developments in the past few years give rise to concerns about the [Ecuadorian] government’s long-term commitment to international arbitration for the settlement of investor disputes,” including Ecuador’s termination of BITs, denunciation of the ICSID Convention, and handling of *Chevron v. Ecuador*.<sup>95</sup> As a result, the USTR warned that the “[Obama] Administration is monitoring developments in connection with these matters under the relevant ATPA eligibility criteria.”<sup>96</sup>

In August 2012, a conservative public policy think tank, the Heritage Foundation, advocated for the USTR to strip Ecuador of its trade benefits under the ATPA/ATPDEA (and even the GSP).<sup>97</sup> Citing Ecuadorian President Rafael Correa’s purported lack of cooperation with the United States on free trade negotiations and anti-narcotics law enforcement, Ecuador’s withdrawal from the ICSID Convention, and attempts by Ecuador to seek enforcement of the *Lago Agrio* judgment in Brazil and Canada, the Heritage Foundation maintained that Ecuador has “acted with contempt for the arbitral process and for [an] award favoring a U.S. firm.”<sup>98</sup> If similar behavior by Argentina led the USTR to suspend its GSP benefits, the Heritage Foundation wrote, then “[s]imilarly strong action should now be taken against Ecuador.”<sup>99</sup>

Against this backdrop, the USTR initiated its 2012 Annual Review of the ATPA/ATPDEA in August 2012.<sup>100</sup> The U.S. Chamber of Commerce, the National Association of Manufacturers, the National Foreign Trade Council, the U.S. Council for International Business, and the Emergency Committee for American Trade each asked the USTR to suspend Ecuador’s preferential trade benefits.<sup>101</sup>

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<sup>95</sup> ATPA REPORT, *supra* note 85, at 26. *See also* *Chevron Corp. v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, *supra* note 80, at IV 28 (upholding jurisdiction); *Chevron Corp. v. The Republic of Ecuador*, Final Award, at 132 (Aug. 31, 2011) (awarding claimant \$77.7 million in damages for Ecuador’s breach of Article II(7) of the United States-Ecuador BIT, plus \$18.6 million in pre-award compound interest). Recently the government of Ecuador initiated State-to-State arbitration against the government of the United States to clarify the scope of Article II(7) of the United States-Ecuador BIT, but the tribunal ultimately dismissed the case for lack of jurisdiction. Luke Eric Peterson, *United States Defeats Ecuador’s State-to-State Arbitration; Will Outcome Dissuade Argentine Copycat Case*, INV. ARB. REP. (Sept. 2, 2012); *see also* United States-Ecuador BIT, *supra* note 82, art. II, ¶ 7 (“Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.”).

<sup>96</sup> *See* ATPA REPORT, *supra* note 85, at 25.

<sup>97</sup> *See* James M. Roberts, *Ecuador Should Forfeit U.S Trade Preferences*, THE HERITAGE FOUND. 3 (Aug. 7, 2012), [http://thf\\_media.s3.amazonaws.com/2012/pdf/ib3695.pdf](http://thf_media.s3.amazonaws.com/2012/pdf/ib3695.pdf).

<sup>98</sup> *Id.* at 2. The Second Interim Award mandated that Ecuador suspend enforcement of the *Lago Agrio* judgment “within and without Ecuador.” *See* Second Interim Award on Interim Measures, *supra* note 77, at 1–2.

<sup>99</sup> *See* Roberts, *supra* note 97, at 3.

<sup>100</sup> *See* Andean Trade Preference Act, 77 Fed. Reg. 47,910 (Aug. 10, 2012).

<sup>101</sup> *See generally* Notice of Opportunity to File Comments on the Beneficiary Countries Under

In its comments to the USTR, Chevron maintained that “exceptional circumstances” warranted the withdrawal or suspension of Ecuador’s status as a beneficiary State.<sup>102</sup> Chevron principally argued that

Ecuador’s failure to take all measures necessary to suspend or cause to be suspended the *Lago Agrio* Judgment is a failure to act in good faith in recognizing as binding or in enforcing an arbitral award in favor of a U.S. company, which is one of the seven statutory reasons that the President “shall not designate” a country as a beneficiary country under ATPA.<sup>103</sup>

Chevron concluded that “[t]he United States should not be giving unilateral trade preferences to countries that fail to abide by their obligations . . . under arbitration awards.”<sup>104</sup>

Ecuador’s ambassador to the United States, Nathalie Cely, submitted a comment to the USTR requesting that the Obama Administration maintain Ecuador’s trade benefits until the expiration of the ATPA/ATPDEA in July 2013, and then push Congress for renewal of the program thereafter.<sup>105</sup> Ambassador Cely maintained that Ecuador has acted in good faith in recognizing as binding or in enforcing arbitral awards in favor of U.S. citizens or corporations, stating that “Ecuador has satisfied every final adverse award against it.”<sup>106</sup>

At the time of writing, Chevron’s petition remains under review by the USTR. However, the petition would seem to be moot as Ecuador renounced its preferential trade benefits under the ATPA/ATPDEA in June 2013, and the U.S. Congress allowed the program to expire at the end of July 2013.<sup>107</sup>

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ATPA, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=USTR-2013-0018> (last visited Nov. 21, 2013) (Docket No. USTR-2013-0018).

<sup>102</sup> See Petition Requesting Withdrawal or Suspension of the Designation of Ecuador as an Andean Trade Preference Act Beneficiary Country, Sept. 17, 2012, at 1 [hereinafter Chevron ATPA Petition]. Chevron previously filed two petitions seeking Ecuador’s withdrawal or suspension from the ATPA/ATPDEA on September 15, 2004 and September 12, 2008. *Id.* at 1, n.1.

<sup>103</sup> See *id.* at 3 & nn.7–8; 19 U.S.C. § 3202(c)(3).

<sup>104</sup> See Chevron ATPA Petition, *supra* note 102, at 12.

<sup>105</sup> See Letter from the Embassy of Ecuador in the United States to the Assistant U.S. Trade Representative for Trade Policy and Economics 1 (Sept. 17, 2012).

<sup>106</sup> *Id.* at 3. Ambassador Cely noted that as of September 17, 2012, Ecuador has satisfied the only three adverse arbitral awards that had become final: Occidental Exploration and Production Company v. Republic of Ecuador, Case No. UN3467; Duke Energy Electroquil v. Republic of Ecuador, ICSID Case No. ARB/04/19; and Varaderos y Talleres Duran, Vatadur v. Republic of Ecuador, Comision Interamericana de Arbitraje Comercial, No. 50181T00413 06. *Id.* at 3, n.14.

<sup>107</sup> See *supra* note 86. While Ecuador can still receive duty-free treatment for many of its goods under the U.S. GSP program, some goods previously eligible for duty-free treatment under the ATPA/ATPDEA are not covered. See Palmer, *supra* note 86. In anticipation that the ATPA/ATPDEA program might not be renewed, Ecuador earlier petitioned the U.S. to add important uncovered products

#### IV. EXPROPRIATION

Another ground that has been relied upon by investors for the suspension of international trade benefits is a State's expropriation of a foreign investor's investment without prompt, adequate, and effective compensation. This section first examines the repeated attempts by U.S. shareholders of Yukos Oil Company (Yukos) to suspend the Russian Federation's trade benefits under the U.S. GSP. It then discusses the recent suspension of Argentina's trade benefits under the EU GSP following Argentina's expropriation of Repsol, a Spanish company.

##### A. Yukos and Russia

The U.S. GSP statute prohibits the President from designating a State as a BDC if the State:

has nationalized, expropriated, or otherwise seized ownership or control of property, including patents, trademarks, or copyrights, owned by a United States citizen or by a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, . . . unless . . . the President determines that prompt, adequate, and effective compensation has been or is being made to the citizen, corporation, partnership, or association . . . .<sup>108</sup>

In recent years, a group of U.S. shareholders of Yukos, a Russian oil and gas company, has repeatedly demanded the withdrawal of Russia's BDC eligibility under the U.S. GSP. These shareholders allege that "Russia has illegally expropriated Yukos and has refused to provide prompt, adequate, or effective compensation to the U.S. citizens harmed by this expropriation."<sup>109</sup>

##### 1. *The Yukos Saga*

In 2003, Yukos was one of the largest and most successful companies

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such as preserved artichokes, cut roses, and frozen broccoli to the GSP program. *Id.*

<sup>108</sup> See 19 U.S.C. § 2462(b)(2)(D)(i)(I), (ii)(I). Two other exceptions to the expropriation "mandatory" factor include instances where the President determines that: (i) "good faith negotiations to provide prompt, adequate, and effective compensation under the applicable provisions of international law are in progress, or the country . . . is otherwise taking steps to discharge its obligations under international law;" or (ii) the dispute has been submitted to arbitration. See 19 U.S.C. § 2462(b)(2)(D)(ii)(II)–(III).

<sup>109</sup> See, e.g., Letter from Covington & Burling LLP to Chairman of GSP Subcommittee of the Trade Policy Staff Committee 2 (Sept. 5, 2006) [hereinafter 2006 Yukos Petition].

in Russia, producing more natural gas and oil than ChevronTexaco.<sup>110</sup> In October of that year, the Russian authorities arrested Yukos founder and CEO, Mikhail Khodorkovsky.<sup>111</sup> Two months later, the Russian Tax Ministry initiated a series of tax re-audits for the tax years 2000–2004, which resulted in the imposition of nearly \$25 billion in new taxes on Yukos.<sup>112</sup> The Russian courts meanwhile froze Yukos’s primary assets, which allegedly hampered the company’s ability to pay the new taxes and eventually led Yukos to declare bankruptcy.<sup>113</sup> Yukos’s assets were sold at auction, and Russian state-owned companies ultimately emerged as the new owners.<sup>114</sup>

Yukos shareholders allege that the Russian Federation engaged in a politically motivated assault to unlawfully discharge Yukos of its assets. They have sought recourse against the Russian Federation in a variety of fora, including at least three international arbitrations.

In *RosInvestCo v. The Russian Federation*, a British investor of Yukos brought an international arbitration pursuant to the United Kingdom–USSR BIT.<sup>115</sup> In 2010, the tribunal rendered a \$3.5 million award in favor of the British investor. In finding a violation of Article 5 of the BIT, the Tribunal held that “the Respondent’s measures, seen in their cumulative effect towards Yukos, were an unlawful expropriation.”<sup>116</sup>

*Quasar de Valores v. The Russian Federation* was an international arbitration brought by Spanish investors of Yukos pursuant to the Spain–USSR BIT.<sup>117</sup> The tribunal rendered a \$2 million award in 2012 in favor of the Spanish investors finding, *inter alia*, that “Yukos’ tax delinquency was indeed a pretext for seizing Yukos’ assets and transferring them to [Russian state-owned] Rosneft . . . [which] supports the Claimants’ contention that the Russian Federation’s real goal was to expropriate Yukos, and not to legitimately collect taxes.”<sup>118</sup>

Finally, the majority shareholders of Yukos brought arbitration proceedings against the Russian Federation pursuant to the Energy Charter Treaty (ECT),<sup>119</sup> a multilateral treaty that provides for investor-State

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<sup>110</sup> See generally *RosInvestCo UK Ltd. v. The Russian Federation*, Final Award, SCC Case No. V079/2005, Sept. 12, 2010; *Quasar de Valores SICAV S.A. v. The Russian Federation*, Award, SCC Case No. 24/2007, July 20, 2012; *Allen v. Russian Federation*, 522 F. Supp.2d 167 (D.D.C. 2007).

<sup>111</sup> See *Quasar de Valores*, *supra* note 110, ¶ 47.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* ¶¶ 89–97.

<sup>114</sup> See *id.* ¶¶ 157, 169.

<sup>115</sup> See *RosInvestCo UK Ltd. v. The Russian Federation*, Award on Jurisdiction, SCC Case No. V079/2005, Oct. 2007.

<sup>116</sup> See *RosInvestCo*, *supra* note 110, ¶¶ 633, 676.

<sup>117</sup> See *Renta4 S.V.S.A. v. The Russian Federation*, Award on Preliminary Objections, SCC Case No. V024/2007, Mar. 20, 2009.

<sup>118</sup> See *Quasar de Valores*, *supra* note 110, ¶¶ 177, 227.

<sup>119</sup> See generally Alison Ross, *The Yukos Story—So Far*, GLOBAL ARB. REV., Feb. 16, 2010, at 12, available at <http://www.globalarbitrationreview.com/journal/article/27647/the-yukos-story-so-far/>.

arbitration of investment disputes in the energy field.<sup>120</sup>

The investors—from Cyprus and the Isle of Man (a dependency of the United Kingdom)—are seeking \$100 billion in compensation.<sup>121</sup> The tribunal held in 2009 that it had jurisdiction over the dispute,<sup>122</sup> and a five-week merits hearing was held in the fall of 2012 in The Hague.

The U.S. shareholders of Yukos, however, are in a different position.

## *2. U.S. Shareholders of Yukos*

There is no bilateral investment treaty or free trade agreement between the United States and the Russian Federation. Nor is the United States a party to the ECT.<sup>123</sup> Thus, unlike the British shareholder in *RosInvestCo*, the Spanish shareholders in *Quasar*, and the Cypriot and Manx shareholders in the ECT cases, the U.S. investors of Yukos have been unable to arbitrate their dispute against the Russian Federation.<sup>124</sup>

As an additional hurdle, the Foreign Sovereign Immunities Act (FSIA) shields the Russian Federation from the domestic courts of the United States.<sup>125</sup> In 2007, for example, the U.S. District Court for the District of Columbia dismissed a lawsuit brought by U.S. shareholders of Yukos against the Russian Federation on the basis that neither the expropriation exception<sup>126</sup> nor the commercial activities exception<sup>127</sup> to the FSIA

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<sup>120</sup> See generally, Matthew T. Parish & Charles B. Rosenberg, *An Introduction to the Energy Charter Treaty*, 20 AM. REV. INT'L ARB. 191 (2010).

<sup>121</sup> See *Investor-State Dispute Settlement Cases*, THE ENERGY CHARTER, <http://www.encharter.org/index.php?id=213> (last visited Nov. 17, 2013).

<sup>122</sup> See *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 226 (Nov. 30, 2009); *Yukos International Ltd. (Isle of Man) v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 227 (Nov. 30, 2009); *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228 (Nov. 30, 2009). The tribunal deferred to the merits phase of the arbitration its decision on the objections to jurisdiction and/or admissibility based on: (i) the "Taxation Measures" carve out in Article 21 of the ECT; (ii) "unclean hands;" and (iii) Russia's contention that "Claimant's personality must be disregarded because it is an instrumentality of a criminal enterprise." See *Hulley*, *supra* at ¶ 600 (b), (c); *Yukos International*, *supra* at ¶ 601(b), (c); *Veteran Petroleum*, *supra* at ¶ 612(B), (c).

<sup>123</sup> See *Members & Observers*, THE ENERGY CHARTER, <http://www.encharter.org/index.php?id=61>. The United States merely is an observer to the Energy Charter Conference. See *id.*

<sup>124</sup> See Letter from Covington & Burling LLP to Chairman of the GSP Subcommittee of the Trade Policy Staff Committee 5 (Dec. 5, 2011) [hereinafter 2011 Yukos Petition] ("U.S. investors are unable to pursue arbitration directly against the Russian Federation. . . . American investors have a valid claim against Russia under international law, but they cannot bring a claim against Russia themselves because there is no bilateral investment treaty (BIT) in force between the United States and Russia."); see also 2006 Yukos Petition, *supra* note 109, at 1 ("To date, Russia has not agreed to let this case be heard on the merits in any forum.").

<sup>125</sup> See 28 U.S.C. §§ 1602–1604 (1980).

<sup>126</sup> See 28 U.S.C.A. § 1605(a)(3) (1980) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United

provided the U.S. court with jurisdiction over the Russian Federation.<sup>128</sup>

For all of these reasons, the U.S. shareholders of Yukos have sought out alternative methods of redress. One such avenue is the U.S. GSP, under which the Russian Federation receives substantial benefits. In 2011, for example, the Russian Federation was the 8th largest U.S. GSP beneficiary, with \$575 million in exports of duty-free products to the United States.<sup>129</sup>

### 3. *Russia and the U.S. GSP*

Starting in 2006, in response to a request for comments on the continued eligibility of BDCs,<sup>130</sup> a group of U.S. shareholders of Yukos submitted a petition requesting the suspension of Russia's preferential trade status under the U.S. GSP.<sup>131</sup> The shareholders claimed that the USTR should withdraw Russia's GSP benefits because "Russia has illegally expropriated Yukos and has refused to provide prompt, adequate, or effective compensation to the U.S. citizens harmed by this expropriation."<sup>132</sup> The shareholders emphasized that "[t]o date, Russia has not agreed to let this case be heard on the merits in any forum."<sup>133</sup>

The U.S. shareholders were the only party to request the suspension of Russia's GSP benefits on the basis of an expropriation without prompt, adequate, and effective compensation. Most comments advocated for maintaining Russia's BDC status.<sup>134</sup> Only one other comment opposed,

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States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States").

<sup>127</sup> See 28 U.S.C.A. § 1605(a)(2) (1980) ("A foreign state shall not be immune from the jurisdiction of courts of the United States . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States").

<sup>128</sup> See *Allen*, *supra* note 110.

<sup>129</sup> See *GSP by the Numbers*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/sites/default/files/GSP%20by%20the%20numbers.pdf> (last visited Nov. 17, 2013). The seven larger GSP beneficiaries were India (\$3.7 billion), Thailand (\$3.7 billion), Brazil (\$2.1 billion), Indonesia (\$2.0 billion), South Africa (\$1.3 billion), the Philippines (\$1.1 billion), and Turkey (\$895 million). See *id.*

<sup>130</sup> See 71 Fed. Reg. 45,079 (Aug. 8, 2006).

<sup>131</sup> See 2006 Yukos Petition, *supra* note 109.

<sup>132</sup> See *id.* at 2.

<sup>133</sup> See *id.* at 1.

<sup>134</sup> See, e.g., Letter from KC America to GSP Subcommittee of the Trade Policy Staff Committee (Sept. 5, 2006), available at [http://www.ustr.gov/sites/default/files/uploads/gsp/asset\\_upload\\_file939\\_9789.pdf](http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file939_9789.pdf) (contending, *inter alia*, that "GSP treatment will help keep these Russian companies [in smaller manufacturing industries] competitive in the United States market."); Comments of Alcoa, Inc.

and that was on the basis of Russia's alleged failure to provide adequate and effective copyright protection to U.S. copyright owners.<sup>135</sup> Despite the shareholders' request, the USTR ultimately decided to maintain the Russian Federation's preferential trade status, likely because of the overwhelming support from interested parties.

In December 2011, the U.S. shareholders of Yukos again petitioned the USTR to review Russia's GSP eligibility as part of the 2011 GSP Annual Review.<sup>136</sup> This petition was made on two primary grounds.<sup>137</sup> First, the shareholders alleged a "direct" expropriation on the basis that "[t]he elimination of Yukos . . . resulted in the transfer of title to Yukos's assets to new State owners."<sup>138</sup> Second, the shareholders claimed an "indirect" expropriation on the basis that the Russian taxes had the effect of destroying Yukos.<sup>139</sup> In July 2012, the USTR deferred a decision on acceptance of the shareholders' petition.<sup>140</sup>

Most recently, in October 2012, the U.S. shareholders filed a renewed petition as part of the 2012 GSP Annual Review.<sup>141</sup> The new effort argued

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on the 2006 GSP Eligibility and CNL Waiver Review Submitted to the GSP Subcommittee (Sept. 1, 2006), *available at* [http://www.ustr.gov/sites/default/files/uploads/gsp/asset\\_upload\\_file939\\_9789.pdf](http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file939_9789.pdf) ("Alcoa urges that GSP eligibility be continued for Brazil, Russia and Venezuela. . . . Loss of GSP treatment for these products will cause significant disruption to our supply chain and harm our customers who rely on these products.").

<sup>135</sup> See Letter from International Intellectual Property Alliance to GSP Subcommittee of the Trade Policy Staff Committee (Sept. 1, 2006), *available at* [http://www.ustr.gov/sites/default/files/uploads/gsp/asset\\_upload\\_file939\\_9789.pdf](http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file939_9789.pdf) ("GSP duty-free benefits to Russia should be immediately withdrawn or suspended because of Russia's failure to provide adequate and effective copyright protection to U.S. copyright owners, as required by the GSP program, specifically section 502(c)(5) of the Act (19 U.S.C. 2462(c)(5))."). *But see* Letter from Pharmaceutical Research and Manufacturers of America to GSP Subcommittee of the Trade Policy Staff Committee (Sept. 5, 2006), *available at* [http://www.ustr.gov/sites/default/files/uploads/gsp/asset\\_upload\\_file939\\_9789.pdf](http://www.ustr.gov/sites/default/files/uploads/gsp/asset_upload_file939_9789.pdf) ("In sum, serious barriers exist to the adequate protection of U.S. pharmaceutical products in Russia. Despite these difficulties, PhRMA members support the continuation of GSP benefits for Russia provided that these issues are resolved soon.").

<sup>136</sup> See 2011 Yukos Petition, *supra* note 124. The only other party that filed a petition regarding Russia in the 2011 GSP Annual Review was US Magnesium, who argued that imports of Russian pure magnesium should not be redesignated as eligible for GSP benefits. See Letter from Economic Consulting Services, LLC to Chairman of the GSP Subcommittee of the Trade Policy Staff Committee (Apr. 5, 2012).

<sup>137</sup> See 2011 Yukos Petition, *supra* note 124, at 6–7. The U.S. shareholders also contended that Russia's economic development called its GSP status into question.

<sup>138</sup> See *id.* at 4–5; see also 19 U.S.C. § 2462(b)(2)(D)(i)(I) (1996).

<sup>139</sup> See 2011 Yukos Petition, *supra* note 124, at 5; see also 19 U.S.C. § 2462(b)(2)(D)(i)(III) (1996). For a discussion on the distinction between a "direct" and "indirect" expropriation, see generally MCLACHLAN, SHORE & WEINIGER, *supra* note 3, at 290–97.

<sup>140</sup> See 77 Fed. Reg. 41,209, 41,210 (July 12, 2012). The U.S. shareholders' petition was in response to the USTR's notice of initiation of the 2012 GSP Annual Review and request for petitions. See 77 Fed. Reg. 44,704 (July 30, 2012).

<sup>141</sup> See Letter from Covington & Burling LLP to Chairman of the GSP Subcommittee of the Trade Policy Staff Committee (Oct. 5, 2012) [hereinafter 2012 Yukos Petition]. The petition was filed in response to the USTR's Notice of Initiation of the 2012 GSP Annual Review. See 77 Fed. Reg. 44,704.



that the 2012 decision in *Quasar de Valores* “made it abundantly clear that Russia has expropriated the assets of American citizens.”<sup>142</sup> The shareholders’ appeal was the only petition filed in the 2012 GSP Annual Review regarding the Russian Federation’s preferential trade status. Again the United States deferred a decision on acceptance.<sup>143</sup>

## B. Repsol and Argentina

Like the United States, the European Union also maintains a GSP scheme. In 2012, the Spanish government and the European Parliament recommended that the European Union suspend Argentina’s GSP benefits as a result of Argentina’s expropriation of Repsol’s controlling stake in Yacimientos Petrolíferos Fiscales (YPF).

### 1. *The Repsol Dispute*

In 1999, the Spanish oil and gas company Repsol purchased YPF, an Argentinean company that, at the time, was the largest private oil and gas company in Latin America.<sup>144</sup> YPF historically was a state-owned entity, only having been privatized in 1993.<sup>145</sup>

Repsol owned a 57 percent controlling share of YPF by 2012.<sup>146</sup> In April of that year, however, Argentine President Cristina Fernández de Kirchner introduced a bill to the Argentine Congress to nationalize 51 percent of the shares of YPF, worth an estimated \$5 billion.<sup>147</sup> The Argentine Congress approved the bill in May 2012 on the basis that Repsol did not sufficiently invest in Argentina to sustain oil and natural gas production, which forced the Argentine government to spend more on fuel imports.<sup>148</sup>

Based on Argentina’s expropriation of YPF, Repsol commenced lawsuits against Argentina<sup>149</sup> and Chevron<sup>150</sup> in the United States District

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<sup>142</sup> See 2012 Yukos Petition, *supra* note 141, at 1; see also *id.* at 2 (“It is now well settled that Russia expropriated the assets of American investors and compensation is due to them as a matter of international law.”).

<sup>143</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, RESULTS OF THE 2012 GSP ANNUAL REVIEW 16 (June 2013), [http://www.ustr.gov/sites/default/files/2012%20AR%20Results%20List\\_0.pdf](http://www.ustr.gov/sites/default/files/2012%20AR%20Results%20List_0.pdf).

<sup>144</sup> See *Our History*, REPSOL, [http://www.repsol.com/es\\_en/corporacion/conocer-repsol/perspectiva\\_historica/](http://www.repsol.com/es_en/corporacion/conocer-repsol/perspectiva_historica/) (last visited Jan. 27, 2014).

<sup>145</sup> See *Argentina: Repsol Files YPF Nationalisation Complaint*, BBC NEWS (Dec. 3, 2012), <http://www.bbc.co.uk/news/world-latin-america-20588088>.

<sup>146</sup> See *id.*

<sup>147</sup> See Jude Webber & Miles Johnson, *Argentina to Renationalise Oil Group YPF*, FIN. TIMES (Apr. 17, 2012), <http://www.ft.com/cms/s/0/ae91248c-87e0-11e1-b1ea-00144feab49a.html#axzz2ExfUdLRr>.

<sup>148</sup> See Alejandro Lifschitz & Karina Grazina, *Repsol: Found Argentina Shale Oil Before YPF Takeover*, REUTERS (July 26, 2012), <http://www.reuters.com/article/2012/07/26/us-argentina-ypf-idUSBRE86P1V920120726>.

<sup>149</sup> Memorandum of Law in Support of Defendant’s Motion to Dismiss the Complaint, Repsol YPF,

Court for the Southern District of New York. The latter suit is an attempt to prevent Chevron from partnering with YPF to develop oil and gas from shale formations in Argentina. As reported, “Repsol is making good on a threat to launch legal action against any company that partners with YPF after Argentina seized control of Repsol’s majority stake in the energy company in April.”<sup>151</sup> Repsol also commenced ICSID arbitration against Argentina in December 2012, pursuant to the Spain–Argentina BIT.<sup>152</sup> Repsol is seeking \$10.5 billion in damages, making it one of the largest cases in ICSID’s history.<sup>153</sup>

## 2. *The EU GSP and Suspension of Argentina’s Benefits*

On April 20, 2012, the European Parliament issued a resolution that “[d]epl[or]e[d] the decision taken by the Argentine government, disregarding a negotiated solution, to proceed with the expropriation of the majority of shares of a European company” and thus “[u]rge[d] the European Commission and the Council to explore and adopt any measures required to safeguard European interests in order to avoid such situations arising again, including the possible partial suspension of the unilateral tariff preferences under the GSP scheme.”<sup>154</sup> The government of Spain also reportedly pressured European Trade Commissioner Karel de Gucht to suspend Argentina’s GSP benefits.<sup>155</sup> These pleas were likely based on the provision

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SA et al. v. Republic of Argentina, No. 12-cv-3877 (S.D.N.Y. May 15, 2012) (contending that Argentina has failed to follow the tender offer requirement in YPF’s by-laws); Memorandum of Law in Support of Defendant’s Motion to Dismiss the Complaint, Repsol YPF, SA v. Republic of Argentina, No. 12-cv-4018 (S.D.N.Y. May 21, 2012) (seeking to compel Argentina to comply with the disclosure requirements of Section 13(d) of the Securities Exchange Act of 1934).

<sup>150</sup> Reply Memorandum in Further Support of Defendant Chevron Corporation’s Motion to Dismiss, Repsol, SA v. Chevron Corp., No. 12-cv-8799 (S.D.N.Y. Dec. 4, 2012).

<sup>151</sup> See *UPDATE 1—Repsol Sues Chevron in U.S. Court Over YPF Deal*, REUTERS (Dec. 4, 2012), <http://www.reuters.com/article/2012/12/04/repsol-chevron-ypf-uscourt-idUSL1E8N4CZ120121204>.

<sup>152</sup> Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic, ICSID Case No. ARB/12/38.

<sup>153</sup> See *Repsol Files YPF Nationalisation Claim at ICSID*, GLOBAL ARB. REV. (Dec. 4, 2012), <http://www.globalarbitrationreview.com/news/article/31027/repsol-files-ypf-nationalisation-claim-icsid/>.

<sup>154</sup> See European Parliament Resolution of 20 April 2012 on the Legal Security of European Investments Outside the European Union (2012/2619(RSP)) (emphasis added).

<sup>155</sup> See *EU Ready to Cut Trade Benefits to Argentina Because of YPF; Warns the Region on Growing Protectionism*, MERCOPRESS (May 7, 2012), <http://en.mercopress.com/2012/05/07/eu-ready-to-cut-trade-benefits-to-argentina-because-of-ypf-warns-the-region-on-growing-protectionism>. In April 2012, the Spanish government announced that it would restrict imports of Argentinean biodiesels, which accounted for €750 million in exports to Spain in 2011. However, after Argentina filed a complaint against the European Community at the World Trade Organization, the Spanish government announced in October 2012 that it would no longer implement the import restriction. See generally Lucas Radicella, *Spain Lifts Import Restrictions on Argentine Biofuels*, ARG. INDEP. (Oct. 17, 2012), <http://www.argentinaindependent.com/currentaffairs/newsfromargentina/spain-lifts-import-restrictions-on-argentine-biofuels/>; see also Request for the Establishment of a Panel by Argentina, *European Union and a Member State—Certain Measures Concerning the Importation of Biodiesels*,

in the EU GSP that allows for the temporary withdrawal of preferential trade status for a State's "serious and systematic unfair trading practices which have an adverse effect on the Community industry and which have not been addressed by the beneficiary country."<sup>156</sup>

However, in light of the fact that the current EU GSP scheme is due to expire on December 31, 2013, the European Union adopted a new GSP scheme on October 31, 2012, with a "[b]etter focus on those countries most in need."<sup>157</sup> The new EU GSP scheme, which will apply as of January 1, 2014,<sup>158</sup> reduces the number of beneficiary States from 176 to 89.<sup>159</sup> Argentina is conspicuously absent from the list of beneficiaries.

Argentina was removed as a GSP beneficiary not (at least expressly) because of its expropriation of Repsol's investment in YPF; rather, the European Union terminated Argentina's preferential status because Argentina had been classified by the World Bank as an "upper middle income economy"<sup>160</sup> during the last three years.<sup>161</sup> Argentina and the eleven other "upper-middle income countries" (as well as seven "high-income countries") lost their current beneficiary status but remain eligible to become beneficiaries again if their situations change (i.e., they no longer are classified as "high-income" or upper-middle income" countries).<sup>162</sup>

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WT/DS443/5, Dec. 7, 2012.

<sup>156</sup> See Regulation (EC) No. 732/2008, 2008 O.J. (L 211) 1, art. 15(1)(d); see also JC Lawrence, *What Can the EU Do About Argentina's Expropriation of Spanish Investments?*, EUROPEAN LAW BLOG (Apr. 26, 2012), <http://europeanlawblog.eu/?p=431> (suggesting that the EU could suspend Argentina's trade benefits under Article 15(1)(d) of the current GSP scheme). The current EU GSP scheme, which was set to expire on December 31, 2011, was extended until December 31, 2013. See Regulation (EU) No 512/2011, 2011 O.J. (L 145) 28, art. 1(5).

<sup>157</sup> See *The EU's New Generalised Scheme of Preferences (GSP)*, EUROPEAN COMM'N 1, 3 (2012) [hereinafter EU GSP Factsheet], [http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc\\_150028.pdf](http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150028.pdf).

<sup>158</sup> See Regulation (EU) No. 978/2012, 2012 O.J. (L 303) 1, art. 43(2).

<sup>159</sup> See EU GSP Factsheet, *supra* note 157, at 4.

<sup>160</sup> In 2012, the World Bank defined "upper middle income economies" as those States having a gross national income (GNI) per capita between \$4,086 and \$12,615 in 2011. "High income economies" were defined as those States having a GNI per capita in excess of \$12,616. See *How We Classify Countries*, THE WORLD BANK, <http://data.worldbank.org/about/country-classifications> (last visited Nov. 17, 2013).

<sup>161</sup> See Regulation (EU) No. 978/2012, *supra* note 158, art. 4(1)(a) ("An eligible country shall benefit from the tariff preferences . . . unless: it has been classified by the World Bank as a high-income or an upper-middle income country during three consecutive years immediately preceding the update of the list of beneficiary countries . . .").

<sup>162</sup> See EU GSP Factsheet, *supra* note 157, at 5–6, 9, 18–19; see also Regulation (EU) No. 978/2012, *supra* note 158, Annex I; Karel De Gucht, *Remarks at the Press Conference on the Review of the Generalised System of Preferences*, EUROPEAN COMM'R FOR TRADE 1, 2 (May 10, 2011), [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147895.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147895.pdf) ("All countries remain eligible to apply for the system should their economic situation change or should their special trade relationship with us lapse."). The other eleven "upper-middle income countries" are Belarus, Brazil, Cuba, Gabon, Kazakhstan, Libya, Malaysia, Palau, Russia, Uruguay, and Venezuela. The new EU GSP also terminates benefits to seven States designated as "high-income countries," including Bahrein, Brunei Darussalam, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates. See EU GSP Factsheet,

The European Commission explains:

[T]hese more advanced developing countries no longer need preferences to export; in fact, continuing to provide preferences to them increases the competitive pressure on exports from LDCs [least developing countries] and other poor countries, which lag behind. This is particularly damaging for these countries, in a context of increased competition due to the general drop in EU tariffs . . . . Even marginal drops in exports by the more advanced, bigger economies, can potentially provide significant opportunities for the poorest, whose exports are very small in comparison. To give an idea of the order or magnitude, a drop of 1% in, say, Brazilian exports, is equivalent to more than 16 times Burkina Faso's total exports to the EU.<sup>163</sup>

The removal of Argentina's preferential trade status under the EU GSP will likely have significant adverse effects on Argentina, particularly when compounded with the concurrent suspension of trade benefits under the U.S. GSP. The European Union is Argentina's second largest export market after Brazil, with more than \$10 billion in annual exports of goods, mainly agricultural products and raw materials.<sup>164</sup>

It is significant that, like the current EU GSP scheme, the new EU GSP scheme again contains a provision for the temporary withdrawal of a State's preferential trade status for "serious and systematic unfair trading practices including those affecting the supply of raw materials, which have an adverse effect on the Union industry and which have not been addressed by the beneficiary country."<sup>165</sup>

## V. CONCLUSION

The United Nations reports that foreign direct investment (FDI) has ballooned worldwide over the last few decades.<sup>166</sup> As disputes commonly arise out of business transactions, the proliferation of FDI inevitably will

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*supra* note 157, at 18–19.

<sup>163</sup> HIGHLIGHTS OF THE EU'S NEW GENERAL SCHEME OF PREFERENCES (GSP), EUROPEAN COMM'N 5, 11 (Oct. 2012), *available at* [http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc\\_150027.pdf](http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150027.pdf).

<sup>164</sup> See *European Commission Directorate-General for Trade: Countries and Regions: Argentina*, EUROPEAN COMM'N, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/argentina/> (last visited Nov. 17, 2013). Argentina's third and fourth largest export markets are China and the United States, respectively. See *id.*

<sup>165</sup> See Regulation (EU) No. 978/2012, *supra* note 158, art. 19(1)(d).

<sup>166</sup> Inward FDI grew exponentially worldwide from \$13 billion in 1970 to \$1.4 trillion in 2012, while during the same period, outward FDI increased worldwide from \$14 billion to nearly \$1.4 trillion. See *Inward and Outward Foreign Direct Investment Flows, Annual, 1970–2012*, UNCTADSTAT, <http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88> (last visited Nov. 17, 2013).

result in an increase in international investment disputes between foreign investors and host States. In some instances, like with the U.S. shareholders of Yukos, international arbitration will not be an available method of dispute resolution because no investment treaty providing for investor-State arbitration exists between the investor's home State and the host State. In other instances, the foreign investor may be reluctant to pursue domestic litigation in either the host State's domestic courts as a result of perceived bias, or in the investor's home courts due to sovereign immunity issues.

Accordingly, investors and host States should be aware of the potential availability of a trade preference program as a "stick" to secure compliance with international law obligations. For the investor, a preferential trade program may serve as an additional tool to induce a host State to cooperate. From the host State's perspective, the threat of suspension of preferential trade benefits will likely be taken into account when assessing the opportunity cost of pursuing certain actions that might affect a foreign investor or investment. The need to be aware of these developments is further elucidated by the fact that in recent years commentators, private corporations, NGOs, individual investors, sovereign States, and even the European Parliament have advocated for the application of this "stick." Moreover, in light of the suspension of Argentina's preferential trade status under the U.S. GSP in 2012, it is highly likely that foreign investors will increasingly seek the suspension of trade benefits as a tool to resolve their international investment disputes with host States.